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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RASHID DEARY-SMITH, Defendant and Appellant.	C080821 (Super. Ct. No. 11F04334)

A jury found defendant Rashid Deary-Smith guilty of attempted murder, first degree burglary, and two counts of attempted first degree robbery. It also found several firearm enhancements true. On appeal, defendant contends (1) insufficient evidence supports his convictions for attempted robbery, (2) overwhelming evidence showed he was incompetent to stand trial, and (3) the trial court erred in failing to stay sentence on burglary under Penal Code section 654.[1] Defendant's first contention has merit. We will reverse both attempted robbery convictions.

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[1] Undesignated statutory references are to the Penal Code.

We separately asked the parties to brief whether remand is appropriate in light of Senate Bill No. 620 (see Stats. 2017, ch. 682, §§ 1, 2, eff. Jan. 1, 2018 (SB 620)) that allows a trial court to strike firearm enhancements imposed under sections 12022.53 and 12022.5. We will remand to allow the trial court to consider exercising its discretion whether or not to dismiss the firearm enhancements under SB 620. We will also reverse several sentencing errors and remand for modification and resentencing. In all other respects, the judgment is affirmed.

FACTS

Defendant and an accomplice came into the home of the victims, a couple living together. By the end of the encounter, defendant, the accomplice, and the boyfriend would be shot.

Returning home from a night of karaoke, the girlfriend (the first victim) pulled her car into her garage and closed the garage door behind her. Getting out of her car, two men, defendant and the accomplice, rushed her.[2] The men wore all black with face coverings. Both had handguns: Defendant, a .45-caliber pistol; the accomplice, a nine-millimeter handgun.

The girlfriend raised her hands, pleading with them not to hurt her. One said, "Shut up bitch," and demanded she open the door connecting the garage to the house, while shoving her towards the door. Possibly because she was not moving fast enough, defendant hit her in the head with his gun, causing her to fall to the floor.

The boyfriend (the other victim) was inside the house. Hearing the ruckus, he grabbed his .40-caliber gun, and partially opened the door to the garage. As he did, he was pushed back into the house and shot in the stomach. The boyfriend, however, was

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[2] They had either been in the garage before she arrived or entered when she opened the garage door.

able to return fire, and shots were exchanged through the closed doorway connecting the house and the garage.

During the battle, the girlfriend got into her car, drove through the closed garage door, and drove to a nearby pharmacy, waiting for police to arrive.

The boyfriend got his shotgun from his bedroom, called 911, and went to the garage. He found defendant on the floor with a gunshot to his head. Zip ties were next to defendant (neither victim owned zip ties). Neither victim had ever seen defendant before.

Responding officers found a loaded, semiautomatic handgun next to defendant. He was wearing black gloves and a sweatshirt with a pulled up hood. When rolled to his side, two more zip ties fell out of his pocket. Defendant's gun had not been fired.

The accomplice went to the hospital for a gunshot to the leg. Defendant was also taken to the hospital.

At the time of the offenses, the boyfriend had about a quarter to a third of a pound of marijuana in the house. When the couple returned home two days after the attack, they found their home had been burglarized. Their television, jewelry, money, alcohol, and the boyfriend's marijuana were stolen.

A jury found defendant guilty of attempted murder (§ 664/187, subd. (a); count 3), first degree burglary (§ 459; count 4), being a convicted felon in possession of a firearm (former § 12021, subd. (a)(1), Stats. 2011, ch. 15, § 501.5, eff. April 4, 2011; count 5), and two counts of attempted first degree robbery in an inhabited building (§ 664/211; counts 1 and 2). As to counts 1, 2, 3 and 4, it found defendant personally used a firearm. (§§ 12022.53, subd. (b) [counts 1, 2, & 3], 12022.5, subd. (a)(1) [count 4].)

The trial court imposed an aggregate prison term of 21 years 8 months. For attempted murder, it imposed the upper term of 9 years plus a consecutive 10-year term for firearm use. (§ 12022.53, subd. (b).) For each of the two counts of attempted first degree robbery, it imposed one-third the midterm plus one-third of the 10-year

term for firearm use (§ 12022.53, subd. (b)), and stayed execution of those terms pursuant to section 654. For first degree burglary, the court imposed a consecutive one-third the midterm or 16 months plus 16 months for firearm use. (§ 12022.5, subd. (a).) For the charge of convicted felon in possession of a firearm, the court imposed one-third the midterm and stayed execution pursuant to section 654. Finally, the trial court revoked defendant's existing probation in case No. 09F02047, and imposed a concurrent eight-month prison term (one third the middle term) on the underlying conviction.

DISCUSSION

I

Sufficiency of the Evidence for Attempted Robbery

Defendant contends insufficient evidence supports his attempted robbery convictions, specifically, the finding he had the specific intent to steal. He notes no property was taken and no evidence showed a demand had been made. He maintains his intent could have been to hold the victims hostage or to assault the girlfriend, but there is no way of knowing beyond a reasonable doubt, and mere speculation cannot support his convictions. We agree.

"[T]o be convicted of attempted robbery, the perpetrator must harbor a specific intent to commit robbery and commit a direct but ineffectual act toward the commission of the crime." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Where the sufficiency of the evidence is challenged on appeal, we review the record in the light most favorable to the judgment, to determine whether it discloses substantial evidence. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) Substantial evidence is evidence that is "reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid.*) We draw all inferences from the evidence that supports the jury's verdict. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) But "[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction.

Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Here, the jury's finding of guilt as to the attempted robbery counts is not supported by substantial evidence. While defendant and the accomplice unquestionably intended to commit *some* crime, the record is silent as to what. To be sure, what they wore, what they brought (zip ties), and what they did is all consistent with a robbery. But it is also consistent with other crimes such as kidnapping or murder. We are left to speculate as to defendant's intent. Therefore, the convictions for attempted first degree robbery, counts 1 and 2, must be reversed.

II

Competency to Stand Trial

Defendant contends overwhelming evidence showed he was incompetent to stand trial. We disagree.

A.

Background

Defendant committed his crimes on June 16, 2011 and was hospitalized until July 27, 2011, with a gunshot wound to his head. He was not arrested until January 8, 2013, in Texas. Three attorneys representing defendant would raise doubts as to his competency. Those challenges were overseen by three different trial judges.

The First Competency Finding

On February 15, 2013, defendant was arraigned. A week later, his counsel declared a doubt as to defendant's competency. The first trial judge suspended criminal proceedings pursuant to section 1368 and appointed Dr. Charles Schaffer to evaluate defendant.

Dr. Schaffer's report concluded defendant was able to understand the criminal proceedings and assist defense counsel in a rational manner. Dr. Schaffer had interviewed defendant and reviewed his records. Dr. Schaffer found defendant's

"almost total global amnesia and almost total inability to respond" to questions during the evaluation was "less than credible," noting transcripts and recordings of defendant's recent jail telephone calls showed defendant was able to carry on a normal conversation with no obvious memory problems. Also less than credible was defendant's inability to explain almost all common legal terms and the roles of the courtroom participants. Dr. Schaffer diagnosed defendant with a cognitive disorder, not otherwise specified, as a result of the gunshot wound to his head as well as antisocial personality disorder.

Prior to jury selection for trial on defendant's competence, defense counsel sought a continuance to have Dr. Jason Roof evaluate defendant, explaining defendant had previously declined to meet with Dr. Roof. The prosecutor agreed to a short continuance.

Dr. Roof's report diagnosed defendant with "Unspecified Neurocognitive Disorder with concern for malingering cognitive deficits and malingering trial incompetence," concluding defendant's responses to various "tools" to determine his competence were consistent with someone who was "feigning trial incompetence" and it was "more likely than not" defendant had an adequate capacity to understand the proceedings and to assist defense counsel in a rational manner.

On October 17, 2013, the date set for trial on defendant's competence, defense counsel submitted the matter on Dr. Schaffer's report. The trial court found defendant competent to stand trial and reinstated criminal proceedings.

The Second Competency Finding

On October 25, 2013, new counsel was appointed for defendant. On February 21, 2014, when counsel declared a doubt as to defendant's competency, the trial court again suspended criminal proceedings and appointed Dr. Schaffer to evaluate defendant.

Defense counsel retained Dr. Stephen Rapaski to evaluate defendant for competency. In his first report, Dr. Rapaski wrote that he had interviewed and tested defendant over two days and diagnosed him with a major neurocognitive disorder due to

a traumatic brain injury. Dr. Rapaski opined defendant's understanding of the nature of the proceedings and his ability to assist counsel was "significantly limited at this time" due to his injury.

In his July 2, 2014 report, Dr. Schaffer reported defendant twice refused to meet with him. Dr. Schaffer again concluded defendant had the ability to understand the criminal proceedings and to assist defense counsel in a rational manner.

At the competency trial before the second judge, held on September 24, 2014, defense witness Dr. Rapaski testified he is a licensed psychologist with a specialty in neuropsychology. Though in his more than 20 years of practice, defendant was the first person he had evaluated for competency. He interviewed and tested defendant over two days. Defendant claimed he did not know the charges against him, could not recount the event that resulted in his brain injury, and gave general information about his children. He also claimed he did not understand the legal process or his legal situation. Dr. Rapaski noted defendant was slow to comprehend and respond and often said he did not know details when asked. Defendant did poorly on several tests, including one showing severe memory impairment.

Dr. Rapaski diagnosed defendant with major neurocognitive disorder due to traumatic brain injury without behavioral disturbance and opined defendant could not understand the nature of the criminal proceedings against him and could not assist defense counsel in a rational manner. Dr. Rapaski reviewed the reports of Drs. Schaffer and Roof as well as other reports but disagreed defendant was malingering since there were no inconsistencies within the evaluation and interview over the two days.

Dr. Rapaski conceded one of the tests he administered could be interpreted to show defendant was malingering. Because of the jail setting, Dr. Rapaski was unable to administer additional tests for malingering.

Dr. Rapaski was asked about defendant's recorded jail conversations. During a call with his brother, defendant remembered the name of a girl his criminal street gang

used to pimp and the name of the man she would marry. Dr. Rapaski believed defendant could remember that information and still have severe memory problems. The audio recordings of the jail calls also reflected defendant was better at expressing himself in that context than when he was interviewed by Dr. Rapaski.

The trial court found defendant competent to stand trial. The court gave a detailed analysis of each doctor's qualifications and experience, thoroughness of each doctor's evaluations, and each doctor's opinions and conclusions. The court concluded defendant was malingering and competent to stand trial.

A Third Judge Determined a New Competency Hearing Was Not Required

On December 12, 2014, new counsel substituted in for defendant. At a March 10, 2015 hearing, defendant's new counsel stated that, but for the previous findings of competency, he would have declared a doubt as to defendant's competency.

On March 12, 2015, at a hearing before a third judge, defendant refused to dress in civilian clothing and defense counsel suggested that defendant believed he could delay trial. Defense counsel again stated he would have declared a doubt as to competency but for the previous findings. Defendant claimed he did not remember the judge or know what was happening. He also claimed he did not know trial was starting or remember asking to represent himself.

The trial court asked defendant if he understood what it meant to represent himself; defendant did not answer. The court noted long gaps of silence after every question posed to defendant. The court decided to review the previous competency rulings and evidence.

On March 23, 2015, defendant stated he wanted to fire his counsel "and go pro per." When the court asked him to explain what he meant by pro per, defendant responded, "I put on my own case." The court ultimately denied defendant's request to represent himself.

On the issue of competency, the court asked defense counsel for comments. Counsel responded, "since the last time we were on the record . . . I've had the opportunity to listen to a tape-recorded telephone call between the defendant and his brother . . . . [¶] That telephone call re[s]olves a number of the concerns that I expressed. And had I listened to it before o[u]r last session on the record, I probably would not have expressed a doubt."

The trial court determined a second competency hearing was not required as it had not been presented with a substantial change of circumstances or evidence casting serious doubt on the competency finding's validity. The court then recounted the procedural history of the competency challenges. Then, noting its own observations, concluded defendant was malingering and no evidence showed a changed condition.

Analysis

On appeal, defendant contends there was overwhelming evidence of his incompetence. He points to Dr. Rapaski's conclusion he lacked the cognitive or language skills to assist his attorney, a report of jail psychiatric services that he had mild aphasia, his attorneys' doubts as to his competence, and his own frequent unintelligible statements in court.

The People respond that the challenge should be dismissed for failure to set forth the legal standards for reviewing his claim on appeal and for failure to identify which of the several competency findings he is challenging. We agree the opening brief is deficient in many respects. Nevertheless, because the People discuss the issue on the merits, setting forth the procedural background and legal analysis, we will reach the merits.

"A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence by the party contending he or she is incompetent." (*People v. Blacksher* (2011) 52 Cal.4th 769, 797 (*Blacksher*).) "[A] defendant is not incompetent if he [or she] can understand the nature of the legal proceedings and assist

counsel in conducting a defense in a rational manner." (*Ibid.*; § 1367, subd. (a).) Competence to stand trial has been defined as "a defendant's ' "sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding" ' *and* ' "a rational as well as factual understanding of the proceedings against him [or her]." ' " (*People v. Welch* (1999) 20 Cal.4th 701, 737, quoting *Dusky v. United States* (1960) 362 U.S. 402 [4 L.Ed.2d 824].)

Once a hearing finding competence has been held, the trial court need not conduct a second hearing unless "it 'is presented with a substantial change of circumstances or with new evidence' casting a serious doubt on the validity of that finding." (*People v. Lawley* (2002) 27 Cal.4th 102, 136.) In determining whether the defendant's mental state has changed, the court may consider its own observations. (*Ibid.*)

We review a challenge to a competency finding for substantial evidence, viewing the record in the light most favorable to the verdict. (*Blacksher, supra,* 52 Cal.4th at p. 797.).

Here, substantial evidence supports the series of competency findings. The first judge appointed Dr. Schaffer, whose report provided substantial evidence of defendant's competence. Though Dr. Schaffer believed defendant suffered from a neurocognitive disorder, he concluded defendant was malingering and was competent to stand trial. Defendant submitted the issue of his competency on Dr. Schaffer's report and the trial court made its ruling based on that report.

Sufficient evidence also supports the competency finding by the second judge and the third judge's finding defendant had not shown a substantial change of circumstances or new evidence raising doubts as to the previous findings. Drs. Schaffer and Roof evaluated defendant as competent to stand trial. Both acknowledged defendant's cognitive impairment due to the brain injury caused by a gunshot wound, but both believed defendant was malingering. Dr. Rapaski's determination defendant was not

competent was reasonably discounted based on his lack of experience evaluating defendants' competency to stand trial.

Finally, substantial evidence supports the third judge's conclusion conditions had not changed. That judge recited the history of the competency challenges and concluded his observations of defendant in court were consistent with the doctors'. Indeed, even defense counsel stated that had he listened to the recordings of the jail calls, he would not have expressed a doubt as to defendant's competence.

In sum, substantial evidence supports the competency findings.

III

Section 654

Defendant contends, under section 654, he cannot be punished for both his attempted murder and burglary conviction because the "attempted murder to which [he] was allegedly an aider and abettor was a byproduct of the burglary." He claims the burglary and the shooting were part of an indivisible course of conduct. We reject this contention.

Though a person may be convicted of more than one crime for the same act, section 654 proscribes multiple punishments for the same act. (§§ 654, 954; *People v. Correa* (2012) 54 Cal.4th 331, 337 (*Correa*).) An "act" can include a course of conduct. (*Id*. at p. 335.) When a course of conduct causes multiple offenses--each capable of being independently committed--section 654's application turns on whether each conviction was based on a separate and divisible transaction. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) Whether a course of conduct is divisible turns on the defendant's intent and objective. (*Ibid*.) " 'If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' " (*Correa* at pp. 335-336.) But if a defendant entertained multiple independent objectives, multiple punishment is permitted. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1134.)

A trial court's finding a defendant held multiple criminal objectives will be upheld if supported by substantial evidence. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.) Where the trial court makes no express section 654 findings, we consider whether substantial evidence supports an implied finding of separate intent and objective. (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.)

Here, the trial court could reasonably conclude the intent to commit murder was a separate objective and did not arise until after the boyfriend grabbed his gun and opened the door to the garage, starting the firefight.

Further, a "multiple victim" exception to section 654 exists, whereby a defendant may be punished for multiple crimes of violence committed against different victims, even if he or she entertained a single principal objective during the indivisible course of conduct. (*People v. Centers* (1999) 73 Cal.App.4th 84, 99.) Burglary may be treated as a violent crime for purposes of the multiple victim exception if there is a finding the defendant personally used a firearm in the commission of the burglary. (*Ibid*.)

Here, defendant personally used a firearm in connection with both the attempted murder and the burglary, rendering both violent. And since the girlfriend was a victim of the burglary and the boyfriend was the sole victim of the attempted murder, the burglary and the attempted murder were two violent crimes against two different victims. (See *People v. Centers, supra,* 73 Cal.App.4th at pp. 101-102.) Accordingly, the multiple victim exception to section 654 applies.

IV

Remand for Firearm Enhancements

We asked the parties to address in supplemental briefs whether remand is appropriate in light of SB 620. The parties agree SB 620 applies retroactively to defendant but they part ways on whether remand would be futile. We will remand.

Prior to January 1, 2018, an enhancement under either section 12022.5 or 12022.53 was mandatory and could not be stricken in the interests of justice. (See former

§§ 12022.5, subd. (c) & 12022.53, subd. (h); Stats. 2010, ch. 711, § 5, eff. Jan. 1, 2011; *People v. Felix* (2002) 108 Cal.App.4th 994, 999.) SB 620 amended sections 12022.5, subdivision (c), and 12022.53, subdivision (h), to permit the trial court to strike an enhancement for personally using a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)).

We agree SB 620 applies retroactively. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [remanding pursuant to the amended section 12022.53]; see also *In re Estrada* (1965) 63 Cal.2d 740, 744.) Here, the amendment took effect before defendant's conviction becomes final, and thus SB 620 applies. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306.)

The People, however, maintain remand is not appropriate because the trial court clearly indicated it would not strike the enhancements. The People note the trial court imposed the upper term on the principal term and ordered the subordinate term to run consecutive to the principal term, for a 21-year 8-month aggregate term. In doing so, the court noted the circumstances in aggravation far outweighed those in mitigation. We are unpersuaded.

That the trial court imposed the upper term and cited aggravating factors does not foreclose the possibility it would separately exercise discretion to strike a firearm enhancement. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 ["Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so"].) As to counts 3 and 4,[3] we will remand the matter to the trial court to exercise its discretion whether or not to strike the firearm enhancements under SB 620.

V

Sentencing Errors

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[3] Since we are reversing the convictions on counts 1 and 2, there is no need to remand the firearm enhancements on those counts.

Finally, we have discovered several sentencing errors that require modification or resentencing. First, in a footnote, defendant raises the possibility that the firearm enhancements found true as to counts 1 and 2 were never part of the amended complaint for which he was held to answer and that was deemed an information. While defendant is correct, as indicated by the amended complaint, we do not need to address this error because we are reversing the convictions on counts 1 and 2 for insufficient evidence.

Additionally, on count 5 (as well as counts 1 and 2) the trial court stayed execution of sentence under section 654. But in doing so, it erroneously imposed one-third-the-middle terms rather than full terms. (See *People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164 ["The one-third-the-midterm rule of section 1170.1, subdivision (a), only applies to a consecutive sentence, not a sentence stayed under section 654"].)

Further, on defendant's probation revocation case, 09F02047, the court erroneously imposed a concurrent eight-month, one-third-the-middle term on count one rather than a full term. (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1156 ["Because concurrent terms are not part of the principal and subordinate term computation under section 1170.1, subdivision (a), they are imposed at the full base term, not according to the one-third middle term formula"].)

We will reverse the sentence on count 5, as well as count 1 in case 09F02047 and remand to allow the trial court to select appropriate terms on those counts.

DISPOSITION

The judgment of conviction is reversed on counts 1 and 2. As to counts 3 and 4, the matter is remanded to the trial court to exercise its discretion whether or not to strike the remaining firearm enhancements under Senate Bill No. 620 (Pen. Code, §§ 12022.5, subd. (c), 12022.53, subd. (h)).

The judgment is further modified to reverse the sentence imposed as to Count 5, as well as count 1 in case No. 09F02047. The matter is remanded for resentencing on those counts.

Consistent with this opinion, the trial court is directed to prepare an amended abstract of judgment reflecting all changes. The trial court is further directed to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
ROBIE, Acting P. J.

/s/
RENNER, J.